IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-588. 75-592

STATE OF WASHINGTON, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, QUILEUTE INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN INDIAN NATION, UPPER SKAGIT RIVER TRIBE, NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, AND PUYALLUP TRIBE OF THE PUYALLUP RESERVATION, *Respondents*

and

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED, *Petitioner,*

v.

UNITED STATES OF AMERICA, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, QUILEUTE INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN INDIAN NATION, UPPER SKAGIT RIVER TRIBE, NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, AND PUYALLUP TRIBE OF THE PUYALLUP RESERVATION, *Respondents*

BRIEF OF RESPONDENT INDIAN TRIBES IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND CONDITIONAL CROSS-PETITION

(Signatures on Page 2 of Cover)

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is published at 520 F.2d 676. The district court's opinion appears at 384 F.Supp. 312.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

On the Petitions for Certiorari:

1. Does the decision of the court of appeals conflict with *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 (1968) by limiting the exercise of state police power over federally secured Indian treaty rights to situations where it can be demonstated that state regulation is necessary for conservation, *i.e.,* to preserve or maintain the fishery resource?

2. Did the court of appeals properly sustain a limited right of tribal self regulation of treaty fishing?

3. Did the court of appeals err in upholding the district court's equitable discretion to fashion remedies assuring fair apportionment of fishing opportunity?

4. Is there a conflict between the 1937 Convention with Canada and the Indian treaties?

On Respondents' Conditional Cross Petition:

5. Has the United States authorized the State of Washington to use its police power to regulate or curtail the exercise of federally secured Indian treaty fishing rights?

TREATIES, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Six treaties between the respondent United States and the respondent Indian tribes each secure continuing off reservation fishing rights to the tribes in almost identical language:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . .

Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty of Point No Point, January 28, 1855, 12 Stat. 933; Treaty with the Makah, January 31, 1855, 12 Stat. 939; Treaty with the Yakima, June 9, 1855, 12 Stat. 951; Treaty with the Quinaeilt, July 1, 1855, 12 Stat. 971.

Respondents, plaintiffs below, predicated their basic claims upon the supremacy clause Article VI, United States Constitution which requires that:

> all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The State of Washington petitioners have contended that the 1937 Convention with Canada (50 Stat. 1355), a 1957 protocol amending it (T.I.A.S. 3867, 8 U.S.T. 1057), and federal statutes pertaining to it are involved. The provisions deemed to be pertinent are reprinted in their Petition/Appendix at pp. 95-100.

STATEMENT OF THE CASE

Proceedings Below

In September, 1970, the United States commenced litigation against the State of Washington on its own behalf and as trustee for several Indian tribes, claiming that state regulatory provisions and practices impinged upon the rights of Indians to fish in Western Washington waterways as guaranteed in six treaties between the tribes and the United States. Jurisdiction was invoked under 28 U.S.C. §1345. Shortly afterwards a number of Indian tribes party to the treaties intervened as plaintiffs. The district court assumed jurisdiction over their claims pursuant to 28 U.S.C. §§1331, 1343(3) and (4) and 1362. The Departments of Fisheries and Game and their respective directors were permitted to intervene as defendants in order to assert their divergent positions on the issues raised. The Washington Reef Net Owners Association also was permitted to intervene.

The plaintiffs sought declaratory relief concerning the extent of treaty secured Indian fishing rights, whether the state had interfered with their exercise, and the degree to which the state lawfully could, if at all, limit or regulate the exercise of such rights. They sought injunctive relief to provide protection and enforcement of those rights. The tribal plaintiffs contended that the state had no authority to regulate their treaty right or otherwise to deprive them of sufficient fish to meet their needs. Defendants' positions ranged from the Department of Game's denial of virtually all Indian treaty rights to the Department of Fisheries' request for a percentage quantification of the Indians' right under continuing total state regulation.

Through extensive pretrial activity and a lengthy trial a record was amassed including reports of experts in fisheries, biology and anthropology, hundreds of exhibits, and testimony of more than fifty witnesses. The district court issued its decision on February 12, 1974 along with some 253 Findings of Fact, and 48 Conclusions of Law.

The district court decision acknowledged the special nature of the Indians' treaty fishing right. It found unlawful as applied several state laws, regulations, and practices as inconsistent with rights under federal treaties and it recognized the tribes' limited right to regulate their members' treaty-secured off-reservation fishing rights. The court also adopted a formula to be used in the future in order to approach more nearly an equal sharing of the fishery resource between Indians and non-Indians, consistent with the purpose of the treaties.

The defendants appealed to the Ninth Circuit Court of Appeals from nearly every aspect of the lower court decision. The Indian tribes also appealed, questioning the decision insofar as it authorizes the state to regulate the exercise of treaty secured fishing rights. On June 4, 1975 the United States Court of Appeals for the Ninth Circuit affirmed the district court decision; subsequently it denied petitioners' request for rehearing.

Summary of Facts

Before American settlement of the Washington Territory, Indians were widely dispersed in communities throughout the area.

> The Indians west of the Cascade Mountains were known as "fish-eaters"; their diets, social cus-

> toms, and religious practices centered on the capture of fish. Their fish-oriented culture required them to be nomadic, moving from one fishing spot to another as the runs varied with the seasons.

520 F.2d 676, 682.

In 1855 the United States sought the Indians' acquiesence in treaties. This was necessary to facilitate occupation and development of the territory by an increasing number of settlers without the inevitable bloodshed and delay of armed conflict and conquest. Within seven months the six treaties involved in this case were negotiated. They provided for extinguishment of Indian claims to most of the vast land area which is now the State of Washington, leaving the Indians a few parcels of land for residence purposes. In return, the Indians received promises of small sums of money and certain goods and services. But the matter of greatest importance to the Indians was the assurance that they would be able to continue fishing as they had in the past, notwithstanding the fact that they might be required to live on reservations.

The treaties were in English, a language which few, if any, Indians present at the negotiations either spoke or read. Although negotiations were in the Chinook jargon, a trade medium of some 300 words which was understood by some Indians, the district court found the jargon inadequate to express precisely the legal effects of the treaty.

The Indian negotiators neither intended nor understood the treaty to limit their right to fish in any way. To provide for their future survival, they insisted upon retaining fishing rights throughout the areas they had

used in the past. They were given the unqualified assurance of the United States negotiators that they would be able to do so. They consented only to share their "usual and accustomed" fishing places with the non-Indian citizens.

At the time of the treaties Indians were trading fish in substantial volume. The treaty negotiators for the government were aware of Indian commerce in fish and understood the contribution of Indian fishermen to the territorial economy, as Indians supplied most of the fish used by non-Indians.

Anadromous fish must return from the sea to their fresh-water streams of origin to spawn in sufficient numbers to assure that there will be future generations. This concept, known as "escapement", dictates that a portion of each run of fish must escape harvest.

Early in the twentieth century, development of a non-Indian commercial fishing industry and rapid population growth began to threaten continued existence of the fish runs and diminish fishing opportunities of both Indian and non-Indian fishermen. Consequently, the State of Washington undertook to regulate the taking of fish to prevent the resource from being destroyed. The prospect of non-Indian regulation had not been suggested to or anticipated by the Indian parties to the treaties.

For many years after the treaties Indians continued to fish as in the past. They successfully assured perpetuation of the fishery resource by enforcement of tribal customs and practices. As conditions changed, however, they recognized the desirability from the standpoint of conservation of having formal regulations of their members' fishing. By setting seasons, closed periods,

gear restrictions, and limiting the number of fishermen, tribes acted to assure that sufficient fish would escape for spawning purposes. Some hired fishery biologists; many utilized expert biological advice from the U.S. Fish and Wildlife Service, an agency of the Department of the Interior. Several tribes, independently or with the United States, initiated fish propagation programs. Indian fishing practices were responsible and effective. Indeed, the district court expressed surprise that in spite of broad allegations and lengthy, vigorous litigation, the state could only produce one uncorroborated instance of Indian off reservation fishing rights being exercised in a manner detrimental to the perpetuation of fish.

The State of Washington was not content to allow Indian tribes to regulate their own treaty fisheries, at least outside the reservations. The state assumed that Indians were subject to its regulatory schemes and utilized state laws and enforcement mechanisms to restrict and prohibit treaty right fishing. The agencies charged by state law with regulation of fishing had goals other than merely assuring survival of the species. As demands upon the harvestable fish—those in excess of spawning escapement needs—escalated tremendously, the Departments of Fisheries and Game allocated fish among commercial and sports users, guided by public policies developed by the state legislature and Game Commission. This system, which failed to consider Indian needs in regulating the state's fish harvests, resulted in a decreasingly significant number of fish being available to Indians. By the time this case was brought, the Indians' treaty off reservation fishery was taking only 5% of the total harvest.

Non-treaty commercial fishing generally occurs before anadromous fish enter the waterways where most Indian usual and accustomed fishing places are located. Washington's management program deprived Indians of the opportunity to share in those fisheries by allocating most or all of the harvestable fish to others before they reached the Indians' fishing places. Any attempts by Indians to harvest the remaining fish typically have been curtailed by imposition of state laws to protect escapement.

A long, acrimonious, and occasionally violent dispute between the tribes and the state has grown out of its fishing management under laws and regulations oriented toward policy goals inconsistent with the exercise of Indian treaty rights. Predictably, the clash triggered considerable judicial activity. *E.g., Department of Game* v. *Puyallup Tribe,* 414 U.S. 44 (1973); *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 (1968); *Tulee* v. *Washington,* 315 U.S. 681 (1942); *United States* v. *Winans,* 198 U.S. 370 (1905). *See also Antoine* v. *Washington,* 420 U.S. 194 (1975).

Each decision of this Court, of the Ninth Circuit Court of Appeals, and of most state appellate courts, has provided general principles for the guidance of the state in its regulation and management vis à vis Indian treaty fishermen; each has recognized that Indians are not subject to state fishing regulations as a matter of course. But judicially announced principles have been interpreted restrictively by the state and applied reluctantly only in factual contexts identical to the cases in which they arose.

More often than not, Indians have had to risk pain of criminal prosecution to test their treaty rights in court by way of defense. Isolated issues were decided piece-

meal. It was not until this case that a court was asked to deal comprehensively with the panoply of concrete problems of an entire region created by the state management and regulatory system, in light of the meaning and intent of the treaties.

Remedies of the District Court

The district court found that state regulations as framed and enforced preferred non-Indian fishermen over Indians. In many instances the state allowed all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reached the plaintiff tribes' usual and accustomed fishing places where treaty rights apply. And the state had closed a substantial number of Indian usual and accustomed fishing areas to Indian net fishing by others while permitting net fishing elsewhere on the same runs of salmon.

The court concluded that state enforcement of fishing laws and regulations against Indians exercising treaty fishing rights at their usual and accustomed fishing places has prevented full exercise of those rights. Enforcement of state law has caused loss of income to the Indians, inhibition of their cultural practices, unlawful confiscations, damage to fishing equipment, arrests and criminal prosecutions. Several corollary matters not relevant here were also determined.

Relief was fashioned based on an extensive exploration of the intent and understanding of the treaties. Policies, practices and laws responsible for many state abuses in derogation of the Indians' treaty rights were declared to be unlawful. Limits of state power over Indian treaty fishermen were defined: the state may

restrict Indian fishing only when it is demonstrated to be necessary to preserve or maintain the resource.

State regulations bring with them a threat of criminal sanctions which has a chilling effect on the exercise of treaty rights. In view of Washington's past practices the district court required regulations (except emergency measures) to be shown to the tribes or the court to be bona fide conservation measures before the state enforces them against treaty fishermen.

The district court recognized the tribes' ability to regulate their members' off reservation treaty fishing upon meeting several stringent conditions and qualifications, but subject to state control whenever a conservation need is shown. A principle of equal sharing of the opportunity to harvest fish destined for Indian usual and accustomed fishing places between Indian and non-Indian fishermen was effectuated through the use of a formula which considers the peculiar aspects of the fisheries as well as the meaning of the treaties. *United States* v. *Washington,* 343 F.Supp. 312 (W.D. Wash. 1974). The court of appeals affirmed the district court on virtually all points *United States* v. *Washington,* 520 F.2d 696 (9th Cir. 1975).

SUMMARY OF ARGUMENT

The treaty fishing right has never been abrogated by act of Congress, subsequent treaty or otherwise. Nor has Congress extended jurisdiction over treaty fishing to the state. But under Supreme Court decisions the state may lawfully impose its regulations on treaty fishermen when it is necessary to do so for conservation. Before a particular measure can be enforced against treaty fishermen by the state it must be shown to be one which is necessary to preserve and maintain the fish,

not simply to carry out state management policies. If the state and a tribe cannot agree that a measure is properly for conservation, the continuing jurisdiction of the court may be utilized to obtain a determination. In the first instance, however, regulation of treaty right fishing should be the responsibility of the tribes acting through their own tribal courts and law enforcement personnel.

Allocation of the opportunity to fish between treaty and non-treaty fishermen should be on a principle of equal sharing. The bargaining positions and understanding of the parties at the time of the treaties dictate that the Indians' share must not be eroded to insignificance by application of state policies designed to further the interests of non-Indians. The formula for guiding the state in allocating fishing opporunity was a reasonable one, adapting the realities of the fisheries to the rights of the parties. To the extent the formula may prove unworkable or unjust, relief can be sought from the district court.

All conservation needs are carefully protected by the decision below and the state is not hindered in its ability to preserve and maintain the fisheries. Respondents find the district court decision as affirmed by the court of appeals to be an acceptable and practical accommodation of rights under the treaties. It comports with decisions of this Court and there is no reason for this Court to grant certiorari. If, however, the decision below is to be subjected to Supreme Court review, so should the overall question of whether the state has any power over Indian treaty fishing.

ARGUMENT

I. The Decision Of The Court Below, Requiring A Showing Of Conservation Necessity Before The State May Regulate Indian Treaty Fishing, Is Consistent With *Puyallup Tribe v. Department of Game.*[1]

In *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 (1968) (*Puyallup I*), this Court upheld a state supreme court decision that the exercise of Indians' treaty protected fishing rights could not be restrained by Washington's prohibition of all net fishing unless the law "has been established to be reasonable and necessary for the conservation of the fishery." *Department of Game* v. *Puyallup Tribe,* 70 Wash.2d 245, 422 P.2d 754 (1967).

The Court set forth standards in *Puyallup I* to guide the state in making the conservation determination on remand. The decision stated that "the 'right' to fish outside the reservation was a treaty 'right' that could not be qualified or conditioned by the State." 391 U.S. at 399. But it also said the state has a limited kind of police power, enabling it to regulate treaty fishing when it is "necessary for the conservation of fish", citing dicta in *Tulee* v. *Washington,* 315 U.S. 681 (1942). The Court cautioned that stricter scrutiny is required of measures for regulating treaty Indians than for regulating non-Indians because "[t]he measure of legal propriety of those

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[1] The tribal respondents have challenged the correctness of *Puyallup I* in the district court and on appeal. In this section they demonstrate that the courts below adhered to that decision. By a conditional cross petition, to be granted only if the Court grants certiorari in Nos. 75-588 and 75-592, respondent tribes ask that this Court determine whether the state may regulate Indian treaty fishing at all. See Argument V.

kinds of conservation measures is therefore distinct from the federal constitutional standard concerning the scope of the police power of a State." 391 U.S. at 401 n. 14. The Court also said state regulations of treaty fishing must meet "appropriate standards" and "not discriminate against the Indians."

After remand, the Department of Fisheries changed its regulations to permit certain limited Indian net fishing, but the Department of Game continued its total ban on taking steelhead by net. The state supreme court ruled that the ban on nets by Game was a proper conservation measure because there were only enough fish in the Puyallup River for sport fishermen and escapement, thus any Indian fishing would be contrary to conservation. *Department of Game* v. *Puyallup Tribe,* 80 Wash.2d 561, 573, 497 P.2d 171, 178-79 (1972). However, this Court rejected Game's management scheme as discriminatory even though it was carried out in the name of "conservation", because it preferred the interests of sport fishermen over treaty right fishermen. *Department of Game* v. *Puyallup Tribe,* 414 U.S. 44 (1973) (*Puyallup II*). The Court made it clear that state policies and goals, beyond preservation of the species, cannot be cloaked in a mantle of "conservation" to curtail Indian treaty fishing.

> Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon . . . .

414 U.S. at 49.

In this case the court of appeals upheld the district court's definition of "conservation" as the perpetuation of a run or species of fish. 520 F.2d at 683. "The necessity to limit the catch to preserve a run defines the extent to which the state may exercise police power to regulate Indian fishing." 520 F.2d at 687. This is the teaching of *Puyallup II*.

State fish managers often include broader objectives than perpetuation of the fishery (*e.g.*, "providing for an orderly fishery" and "assuring the maximum sustained harvest") in their definition of conservation. But "the only rationale for permitting state interference with Indian fishing precludes adoption" of a definition which forces "treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens." 520 F.2d at 686.

Following *Puyallup II*, the court also validated state regulation as a vehicle for the "protection of the interests of all those entitled to share" in the resource (384 F.Supp. at 402) and held that, because "[b]y the treaty, the Indians granted citizens of the territory the right to fish in common with them, . . . the state may [also] enforce regulations insuring that both groups have fair access to the fish at the treaty areas."[2] 520 F.2d at 687. But the court found that Washington had not used its regulatory power to effect such fairness.

> Certainly, [the Indians] did not understand that in permitting other citizens access to their tradi-

[2] Compare the language of this Court in *Puyallup II:* "The aim is to accommodate the rights of Indians under the Treaty and the rights of other people." 414 U.S. at 49. The formula to be used in assuring fair apportionment of harvestable fish is discussed in section III, pp. 21-25, *infra*.

> tional fishing areas they were submitting to future regulations calculated to benefit those other citizens.
>
> Nevertheless, this is precisely how the state of Washington has regulated fishing for years. In treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory.

520 F.2d at 685.

The petitioners balk at the requirement of the court below that a "regulation of treaty right fishing must be . . . established by the state, either to the satisfaction of all affected tribes or . . . [the district] court, to be reasonable and necessary to prevent demonstrable harm to the actual conservation of fish." 384 F. Supp. at 342. The alarm of petitioners over this requirement is not justified.[3] The district court's supervisory authority does not impede the state unreasonably in its management and regulation of the fishery. Subject to the Indians' right to an equal opportunity to fish, the state may regulate non-Indians to achieve whatever goals it chooses. And the ability of the state to respond to unforeseen conservation needs was preserved by the district court. Emergency regulations (which constitute nearly all of the restrictions

[3] The apocalyptic fears that Indians will destroy the fishery expressed by petitioners, especially the Northwest Steelheaders Council, are disingenuous. Nothing in the record supports any past history or future likelihood of Indians' abusing the treaty right to the detriment of the resource. In fact, the contrary is true. *See* 384 F.Supp. at 338 n. 26. Even if, as petitioners suggest, Indians desired to use poison or dynamite to harvest fish, or to place their nets across river mouths and entrances to hatcheries, adequate conservation powers remain with the state to prevent such acts.

promulgated during a fishing season) may be imposed upon Indian treaty fishermen *without* prior court review. 384 F.Supp. at 417. Further, the state continues to determine escapement goals and how many fish are harvestable by all fishermen.

Although the tribes may develop in their governing bodies and enforce in their own courts regulations concerning their members' fishing, all proposed regulations must be discussed first with both Fisheries and Game and they must include any state regulations which are reasonable and necessary for conservation. If a tribe has not qualified as "self regulating", the state may enforce regulations which are necessary for conservation directly upon Indian fishermen. Further, the tribes must provide catch reports to the state and permit the state agencies to monitor their off-reservation fishing for conservation reasons.

Even absent strong legal reasons, it would not have been surprising for an equity court to refuse to leave the state as the sole arbiter of which laws are necessary for conservation and shall be applied to Indians. The district court found far reaching abuses of this power by the state in the past. *E.g.,* 384 F.Supp. at 358, 365, 367, 369, 374, 388, 390, 393, 403-04. Indeed, the district court found that "state regulation . . . is highly obnoxious to Indians and in practical application adds greatly to already complicated and difficult problems . . . ." 384 F.Supp. at 339.

The court of appeals pointed out that in regulating Indians the state is "not enforcing state policies but applying federal rights to concrete situations." 520 F.2d at 687. For this reason the district court "wisely" retained approval authority over state regulations of

treaty fishing.[4] To assist in the court's exercise of continuing jurisdiction and assure its ability to respond promptly and intelligently to the needs of the parties it appointed the magistrate to act as a special master and an eminent fishery biologist to serve as its fisheries advisor.

The continuing involvement of the district court in fisheries management in order to protect federally guaranteed rights is assailed by petitioners. This was a concern of the court of appeals, too. But the necessity for it is directly attributable to the petitioners' own demonstrated hostility to Indian treaty fishing.

> The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sport fishing allies) which produced the denial of Indian rights requiring intervention by the district court.

520 F.2d at 693.

II. Preservation Of A Limited Right Of Tribal Self-Regulation Is Consistent With Congressional Policy And Decisions Of This Court Barring State Interference With Tribal Self Government.

A restriction of state regulatory authority over Indians exercising a federal treaty fishing right does not imply that Indian fishing can take place unregulated. The record shows that historically this has not been the

[4] In another treaty fishing rights case, Sohappy v. Smith, 302 F.Supp. 899 (D. Ore. 1969) the district court retained continuing jurisdiction. For 6 years the court regularly has determined whether state fishing regulations challenged by Indians are reasonable and necessary for conservation.

case; the Indians have always been concerned for the preservation of the fisheries and have acted responsibly to protect the runs. The district court found that the respondent tribes have governing bodies capable of promulgating and enforcing their own off reservation fishing regulations.

This Court has said recently that Indian tribes possess independent authority and have "attributes of sovereignty over *both* their members and their territory." *United States* v. *Mazurie,* 419 U.S. 544, 577 (1975) (emphasis added). And Congress has fostered the concept of tribal self government through enactment of the Indian Reorganization Act [5] and other legislation [6] designed to strengthen tribal government.

The treaties were not grants to the Indians, but grants to the United States from which the tribes reserved certain rights. This Court has said of the treaties in this case that "[r]eservations were not of particular parcels of land . . . [but rather] imposed a servitude on every piece of land" to make possible continued fishing by the Indians. *United States* v. *Winans, supra* at 381 (1905). There is not the slightest intimation that the Indians thought they would be yielding authority over their fishing right "reservations" to some future government any more than they were consenting to incursion of such authority over lands reserved for their occupancy. "If this power is to be taken away from them, it is for Congress to do it." *Williams* v. *Lee,* 358 U.S. 217, 223 (1959). In another

[5] 25 U.S.C. §§ 461-479. See Williams v. Lee, 358 U.S. 217, 220 (1959); Morton v. Mancari, 417 U.S. 535, 542 (1974).

[6] *E.g.*, Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341; Indian Self Determination Act, 25 U.S.C. (Supp.) §§ 450-450n.

case involving one of the same treaties the court of appeals found that "[t]he Indians must surely have understood that Tribal control would continue after the Treaty." *Settler* v. *Lameer,* 507 F.2d 231, 236 (9th Cir. 1974).

This Court consistently has barred interference with tribal self government when a tribe's internal affairs are involved. See *Williams* v. *Lee, supra; McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164 (1973). The authorization and regulation of tribal members exercising a tribally reserved and held right at a "usual and accustomed fishing place" is as much an internal affair as regulating the conduct of tribal members within land reservation boundaries. And the tribes should be able to determine and pursue their own policies through their regulations just as the Departments of Fisheries and Game utilize their regulatory power over non-Indians to pursue differing policy goals.

The district court recognized this Court's acknowledgement of a sphere of permissible state power over off-reservation Indian treaty fishing. Thus, the state shares jurisdiction over Indian fishing, the limits upon state authority being defined by conservation necessity. Neither the tribes nor the state may preempt the jurisdiction of the other.[7] 384 F.Supp. at 403. But the

[7] This is not, as petitioners suggest, the "duality of sovereignty" discussed in New York *ex rel.* Kennedy v. Becker, 241 U.S. 556 (1916). There the Court disapproved a division of authority where "either [the Indians or the state] would be free to destroy the subject of the power" because "neither could exercise authority with respect to the other at the *locus in quo.*" 241 U.S. at 563. But here "the essential power of preservation" is maintained in the state.

In any event, *Kennedy* is inapposite. It involved a private transfer of land; not a treaty with the United States. The document there preserved "privileges", not rights. And the state was in existence at the time of the transfer in *Kennedy* so exercise of its powers could be anticipated.

state may regulate the fishing of any tribe at any time if it is necessary for conservation. The only exception to this is that a tribe which has met the stringent qualifications and conditions for "self-regulation" must adopt and itself enforce the state conservation measure. 384 F.Supp. at 340-41. A tribe which does not comply may be stripped of its self-regulating status.

"[T]he legitimate conservation interests of the state are not infringed" by allowing tribal regulation subject to court imposed conditions insuring tribal responsibility in the first instance, with a fail-safe providing for the imposition of state regulation if necessary for conservation. 520 F.2d at 686.

III. The Court Of Appeals Properly Upheld The District Court's Equitable Remedies Providing For Fair Apportionment Of Fishing Opportunity.

Based upon anthropological evidence of the Indians' most likely understanding of the treaty language, the fishing practices immediately following the treaties, and definitions of the language found in contemporaneous dictionaries, the district court interpreted the treaty to mean that the parties should be entitled to share equally in the opportunity to fish.[8] At most, "the Indians may have been told or understood that

[8] Familiar rules of treaty construction demand that treaties be interpreted as Indians would have understood them, *e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970), that any ambiguities be resolved in favor of the Indian parties, *e.g.*, McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 174 (1973), and that treaty terms be liberally construed in favor of the Indians, Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

non-Indians would be allowed to take fish at the Indian fishing locations along with the Indians". 384 F.Supp. at 357, 355. But "[w]hite civilization has . . . engulfed that of the Indian," and a state policy under which Indian opportunity to fish is determined by their numbers, as it is with other citizens, "effectively allots them a decreasing share of the resource." 520 F.2d at 687.

Petitioners continue to argue that it is "unfair" for Indians, a small minority of the total state population,[9] to be able to harvest more fish per capita than non-Indians. Of such a contention this Court remarked "[t]his is certainly an impotent outcome to negotiations and a convention which seemed to promise more and give the word of the nation for more." *United States* v. *Winans, supra,* 198 U.S. at 380. The Indians could not have intended that their rights "upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed" (*United States* v. *Winans, supra,* 198 U.S. at 381), would be progressively eroded. Furthermore, if the petitioners' reasoning were accepted, the Indian treaty rights would be effectively abrogated by attrition with every change in population that reduced the proportion of Indians. These treaty rights, of course, may only be abrogated by Congress.

[9] Petition of State of Washington, et al. (No. 75-588) pp. 9, 29; Petition of Northwest Steelheaders Council of Trout Unlimited (No. 75-592), pp. 12, 17, 18. The figure of 794 Indian fishermen, which was a Fisheries Department estimate made prior to trial, is misleading. The record shows that the fourteen tribes party to the case (about half the number of tribes with treaty rights) have memberships totalling about 11,000, many of whom fish or would do so if not prevented by the state.

E.g., Menominee Tribe v. *United States,* 391 U.S. 404 (1968).[10]

The court of appeals approved the district court's decision that "[t]reaty Indians . . . are to have the opoprtunity to take up to 50 percent of the available harvest at their traditional grounds." 520 F.2d at 683.[11] Analogizing to the situation of cotenants, the court noted that

> In each treaty, two parties—the United States and a tribe—bargained on the basis of formal equality. [Therefore, an] attempt to partition equitably rights which these parties were to hold in common must reflect this initial equality.

Thus, it concluded, "the court's apportionment was well within its discretion." 520 F.2d at 688.

When this Court indicated in *Puyallup II* that numbers of harvestable fish must be "fairly apportioned" between Indian and non-Indian fishermen, it recognized some of the difficulties. 414 U.S. at 48. The decision below provides for an "additional equitable adjustment" to solve some of the practical problems of the state in determining and controlling with mathematical precision the numbers of fish of a total run which actually would be available to Indians at their fishing places—typically the "last stop" on the

[10] Reductions in the non-Indian fishery necessitated by the decision below may be politically unpopular in Washington. The exclusive forum for resolution of political issues, and any modification of the Indian treaty right, is Congress.

[11] The state and its Fisheries Department first suggested an objective, percentage formula to the court (a "one-third" share for Indians of a less inclusive harvestable number). They apparently disagree now not with the fact, but the size, of the percentage.

upstream migration of the fish. The purpose of the equitable adjustment in fishing opportunity is "to compensate treaty tribes for the substantially disproportionate numbers of fish" destined for their fishing places but which are intercepted by non-treaty fishermen who are beyond control of the state. 384 F.Supp. at 344. The court of appeals found the adjustment to be within the district court's equitable discretion to the extent that it adds back into the total number of shared fish those caught by Washington's non treaty citizens while outside the state's jurisdiction.

Also affirmed by the appeals court was exclusion of the on reservation catch from the number of fish to be shared between Indians and non-Indians.[12] That right, of course, derives from another section of the treaty providing for the Indians' exclusive use of reservations and was not the subject of this litigation. In any event, there has been no disagreement between the parties that Indians have an exclusive fishing right on their reservations. The Indians could not have expected or intended that they would be required to share their exclusive on reservation fishing opportunities with non-Indians.

The equitable jurisdiction of a court provides considerable latitude in fashioning relief which is fair and appropriate, based upon the court's knowledge of the facts and the parties. As we have already shown, the actions of petitioners called for specific relief, calculated to remedy a long standing deprivation of federal rights. Careful scrutiny of the evidence con-

[12] The state did not contest exclusion of fish harvested for subsistence and tribal ceremonial use from the number to be shared. 520 F.2d at 690.

cerning the treaty negotiations and the meaning of treaty language to the Indians, as well as evidence on the realities of fishery management, led to a decision providing for equal sharing of fishery opportunity. Far broader exercises of equitable discretion in other complicated situations regularly have been sustained by this Court.[13] Here the district court not only operated well within its discretion in fashioning a remedy to fit the problems it was asked to solve, but also made an apportionment of the right in a manner which "best effectuates what the Indian parties would have expected . . . ." 520 F.2d at 688.

IV. The 1937 Convention With Canada Does Not Conflict With The Indian Treaties.

The Convention Between the United States and Canada for the Protection of Fraser River Sockeye and Pink Salmon, 50 Stat. 1355 (1937), as supplemented by T.I.A.S. 3867, 8 U.S.T. 1058, provides for an equal division of the salmon harvest of the Fraser River between the two countries. The decision below is concerned only with allocation as between Indian and non-Indian fishermen of the United States' share of the fish.

The district court ruled that "treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission [set up under the convention] must comply with regulations of the Commission." 384 F.Supp. at 411. In affirming the court of appeals held that "all persons, including Indians, [are] subject to Commission regulations."

[13] *E.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971) (school desegregation); Reynolds v. Sims, 377 U.S. 533, 585 (1964) (reapportionment).

520 F.2d at 690. To the extent the tribes are prevented from having an equal opportunity to harvest the United States' share of fish, because such harvests are beyond state regulation, an equitable adjustment must be made in fishing opportunity under the state's jurisdiction.

It seems clear that the 1937 Convention and legislation implementing it do not conflict with, and could not have been intended to abrogate, the Indian treaty fishing right. To so hold would be contrary to all established authority. See Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows Upon the Earth'—How Long a Time is That?*, 63 CALIF. L. REV. 601 (1975).

Petitioners complain that since the decision below they have been ordered by the district court to disobey commission regulations. They do not state fully the circumstances of the controversy. In any event, that dispute is now before the Ninth Circuit Court of Appeals pursuant to petitioners' notice of appeal dated October 2, 1975. It is not properly here.

V. In The Absence Of A Congressional Grant Of Authority The State May Not Regulate Or Restrict The Exercise Of Treaty Fishing Rights.

Respondent Indian tribes urge by way of a conditional cross petition that if the Court grants certiorari, it should also review the threshold questions of whether or not prior decisions of this Court allowing state regulation of federal treaty rights are correct in the circumstances of this case.

In *Puyallup I* this Court held that "[t]he overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is preserved." 391 U.S. at 399. Respondents believe that the decision below is entirely consistent with this precedent, but they have argued throughout the litigation that *Puyallup I* is not correct.

The district court devised a system of fisheries regulation and allocation which is fair to all and which will resolve a long and bitter dispute. Respondent tribes recognize the value of maintaining an equitable, practical solution which has been in effect for nearly two years. They also recognize that it was necessary for the court to vest ultimate conservation regulatory authority in the state under *Puyallup I*. The intent of the treaties was effectuated, but the exercise of rights under them was subjected to state police power. Consequently, if petitioners' challenges to this system are to be considered by the Court, so should be the challenge of the tribes to the existence of any regulatory authority in the state.

The supremacy clause of the United States Constitution mandates that a federal treaty concerning the taking of game overrides state game regulation power. *Missouri* v. *Holland*, 252 U.S. 416 (1920). Congress has especially broad prerogatives in the area of Indian affairs which exclude most exercises of state power. *E.g., Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685 (1965). And only express congressional acts can extend jurisdiction over Indians. *E.g., McClanahan* v. *Arizona Tax Commission, supra; Mattz* v. *Arnett*, 412 U.S. 481 (1973). Although state law generally can be applied as against Indians outside the reservation, there can be no application where, as here, it would "impair a right granted or reserved by federal law." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). The preemptive authority of federal laws

concerning off-reservation activities of Indians regularly has been upheld. *E.g., Johnson* v. *Gearlds,* 234 U.S. 422 (1914). See also *Antoine* v. *Washington, supra.*

It has often been said that Congress may modify or abrogate Indian treaties unilaterally, or extend jurisdiction over Indian affairs all or in part to the states. Congress has done both in specific instances but it has never done so with respect to the treaty fishing rights here in question.[14] The only act of Congress granting jurisdiction over Indians to states (including Washington) prohibits the exercise of any jurisdiction which would deprive Indians of rights to exercise or control treaty fishing rights. 18 U.S.C. § 1162. See *Menominee Tribe of Indians* v. *United States, supra.*

The record establishes beyond question that the Indian parties did not intend to submit their fishing rights to the control of any then non-existent non-Indian authority. Nothing in the record or the treaties can support a contrary interpretation, especially in view of the rules of Indian treaty construction.[15]

In response to the contentions of the Indian tribes, the district court analyzed in some detail the decisions relied upon by the Court in *Puyallup I* for the proposition that there is state power over Indian treaty fishing. 384 F.Supp. at 334-39. The court found that

> to the present time there never has been either legal analysis or citation of a nondictum authority

[14] The district court cited three instances in which Congress has failed to enact proposed legislation to terminate the Indian treaty fishing rights which are the subject of this case. 384 F.Supp. at 338 n. 24.

[15] See *supra* note 8.

> in any decision of the Supreme Court of the Land in support of its decisions holding that *state* police power may be employed to limit or modify the exercise of rights guaranteed by national treaties which the federal Constitution mandates must be considered and applied as "the supreme Law of the Land."

384 F.Supp. at 338.

Nevertheless, the court felt bound by judicial duty to conform its decision to Supreme Court authority and therefore rejected the tribes' contentions. The tribes appealed, but the court of appeals upheld the district court decision, stating simply that the tribes' "assertion is foreclosed by the decision in *Puyallup* . . . ." 520 F.2d at 682 n. 2.

The decision in *Puyallup I* has been sharply criticized as not soundly based and out of line with other Indian cases. *E.g.,* Johnson, *The State Versus Indian Off Reservation Fishing: A United States Supreme Court Error,* 47 WASH L. REV. 207 (1972). It was decided on a record with little or no evidence concerning the negotiation and meaning of the treaties. Furthermore, the biological evidence was nearly all from the perspective of state fish managers. And the Court had before it a stipulation not based in fact which raised the specter of unbridled, destructive Indian fishing. See 391 U.S. at 403 n. 15. By contrast, this case has a complete record of anthropological and biological facts upon which a decision on the propriety of state regulatin of Indian fishing can be made soundly.

Any consideration of the decision below by this Court should include a review of *Puyallup* which was the legal foundation for subjecting respondents' treaty rights to state regulation.

CONCLUSION

The Court should deny the petitions for certiorari. However, should the Court grant the petitions in Nos. 75-588 and 75-592 it should also grant respondents' conditional cross-petition so that there can be a full review of the decision below and its underpinnings.

Respectfully submitted,

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